



## INTERIOR BOARD OF INDIAN APPEALS

Mildred Frazier v. Acting Portland Area Director, Bureau of Indian Affairs

21 IBIA 11 (10/08/1991)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

MILDRED FRAZIER

v.

ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-111-A

Decided October 8, 1991

Appeal from dismissal of a challenge to a Secretarial election for the Puyallup Tribe.

Affirmed.

1. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Indians: Tribal Government: Elections

A challenge to an election conducted under 25 CFR Part 81 must be filed within 3 days following posting of the election results.  
25 CFR 81.22.

2. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Indians: Tribal Government: Elections

25 CFR 81.23(a) provides for posting of election results in the local Bureau of Indian Affairs office.

3. Board of Indian Appeals: Jurisdiction--Regulations: Generally

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

APPEARANCES: Appellant, pro se; Vernon Peterson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Mildred Frazier seeks review of a June 4, 1991, decision of the Acting Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), dismissing appellant's challenge to an April 27, 1991, Secretarial

election for the Puyallup Tribe. <sup>1/</sup> For the reasons discussed below, the Board affirms the Area Director's decision.

### Background

On April 27, 1991, pursuant to 25 CFR Part 81, BIA conducted a Secretarial election at which members of the Puyallup Tribe voted on six proposed amendments to the Puyallup Constitution. The election took place at the tribal community hall in Tacoma, Washington, on the Puyallup Reservation. All six amendments were adopted.

On May 1, 1991, appellant mailed an election challenge to the Puget Sound Agency, BIA, at Everett, Washington. The challenge was received at the agency on May 2, 1991, and forwarded on the same day to the Area Director, who, on June 4, 1991, dismissed it as untimely. The Area Director's decision also discussed the merits of appellant's challenge and rejected it on the merits as well.

Appellant's notice of appeal from this decision was received by the Board on July 5, 1991. <sup>2/</sup> Upon review of the notice of appeal and the Area Director's decision, the Board concluded that the timeliness issue, if decided correctly by the Area Director, would be dispositive of this appeal. The Board therefore ordered expedited briefing on that issue. Briefs were filed by appellant and the Area Director.

### Discussion and Conclusions

[1] The Area Director dismissed appellant's challenge as untimely under 25 CFR 81.22, which provides:

Any qualified voter, within three days following the posting of the results of an election, may challenge the election results by filing with the Secretary through the officer in charge the grounds for the challenge, together with substantiating evidence. If in the opinion of the Secretary, the objections are valid and

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<sup>1/</sup> "Secretarial election" is defined at 25 CFR 81.1(s) as "an election held within a tribe pursuant to regulations prescribed by the Secretary [of the Interior] as authorized by Federal Statute (as distinguished from tribal elections which are conducted under tribal authority. \* \* \*)." (Emphasis in original.)

<sup>2/</sup> By order of July 12, 1991, pursuant to its authority under 43 CFR 4.21(a) and 4.314(a), the Board placed the Area Director's decision into immediate effect with respect to two of the constitutional amendments. These were Amendment C to Article III, enlarging the tribal council from five to seven members, and Amendment F to Article VII, reducing the tribal voting age from 21 to 18. These two amendments were to be implemented in a tribal election scheduled for July 13, 1991. The Board found that, under the circumstances, the public interest required that the tribal election be allowed to proceed.

warrant a recount or new election, the Secretary shall order a recount or new election. [Emphasis in original.]

An affidavit from Donna M. Green, Tribal Operations Officer for the Puget Sound Agency, was included with the Area Director's brief in this appeal. Ms. Green served as Election Board Chairman for the April 27 election. Her affidavit states at paragraph 4:

25 CFR § 81.23 (a) provides that the election results shall be posted at the local BIA office, the tribal headquarters and other appropriate places. [3/] It is routine practice for the BIA to tally the votes and post the results on the reservation as soon as possible after the close of an election. Therefore, on the evening of April 27, 1991, at my direction, copies of the Certificates of Results of Election for all six amendments were posted at the three reservation locations specified in the voter's pamphlet [4/] for posting of the voter's list and at other customary places on the reservation where tribal members traditionally view all tribal election results. The results were affixed to the outside of buildings at the various locations in a manner customary for Puyallup elections. There is no local BIA office on the Puyallup Reservation. Election results were not formally "posted" at the Puget Sound Agency at Everett. This is consistent with Bureau practice for all Secretarial elections conducted by the Agency.

Appellant does not dispute that her challenge was postmarked May 1, 1991, and received at the agency on May 2, 1991. Nor does she dispute Ms. Green's statement that the election results were posted on the reservation on April 27. It is undisputed, therefore, that appellant's challenge was filed more than 3 days after the election results were posted on the reservation. 5/ Accordingly, unless there was some deficiency in the posting, appellant's challenge was untimely.

Appellant's arguments are, in essence, arguments that the posting was defective or, at least, incomplete on April 27. She argues that the election results were required to be posted in the Puget Sound Agency and could not have been posted there until Monday, April 29, 1991, the first business day after the election. She also argues that the election results posted

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3/ 25 CFR 81.23(a) provides: "The results of the election shall be posted in the local Bureau of Indian Affairs office, tribal headquarters, and at other appropriate public places determined by the election board."

4/ This pamphlet was sent to tribal members in March 1991. The four locations listed in the pamphlet for posting of the voter's list were the Puyallup Dental Clinic, the Puyallup Tribal Office, the Puyallup Health Clinic, and the Puget Sound Agency, BIA.

5/ It is not clear whether a challenge is "filed" under 25 CFR 81.22 when it is mailed or when it is received at the BIA agency. In this case, both the date of mailing and the date of receipt were more than 3 days after the election results were posted on the reservation.

on April 27 could not have included all absentee ballots because, under the election rules, absentee ballots postmarked April 26 were to be counted. Further, she contends that the voter's pamphlet gave incomplete information in that it stated that challenges could be made within 3 days following "announcement" of the election results but did not say how the announcement would be made; did not state where the results would be posted; and did not state who would post them. Finally, appellant argues that voters who lived outside the area did not have a fair and equitable opportunity to challenge the election.

[2] The Area Director acknowledges that 25 CFR 81.23(a) requires posting of election results in the "local Bureau of Indian Affairs office" but argues that there is no local BIA office for the Puyallup Reservation, noting that the Puget Sound Agency, which has administrative jurisdiction over the reservation, is 60 miles away in Everett, Washington. On the other hand, he states, prior to the election, the voter's list was posted at the Puget Sound Agency pursuant to 25 CFR 81.12, which requires posting at the "headquarters of the local administrative unit of the Bureau of Indian Affairs." 6/

At first glance, there does not appear to be any ambiguity in the requirement in section 81.23(a) that election results be posted in a BIA office. However, an ambiguity becomes apparent when, upon comparison of sections 81.12 and 81.23(a), it is observed that different terms for BIA facilities are used in analogous contexts. Neither term is defined in Part 81. Because different terms are used in comparable sections in the same regulation, it appears likely that different meanings were intended. The term "headquarters of the local administrative unit of the Bureau of Indian Affairs," used in section 81.12, more clearly conveys the sense that posting at a BIA office is required regardless of whether there is such an office on or near the reservation concerned. 7/ Thus, it is feasible that the term "local Bureau of Indian Affairs office" in section 81.23(a) is intended to mean, as the Area Director's argument suggests, only BIA offices located on or near the reservation where the election takes place.

Also to be considered, in seeking the proper interpretation of the term, is the purpose of posting election results--primarily, of course, to inform tribal members of the results, but also to start the clock running for the filing of challenges. For this second purpose, it is obviously preferable that all copies of the results be posted simultaneously so that

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6/ 25 CFR 81.12 provides in part:

"A copy of [the voter's] list shall be supplied to any district election board and shall be posted at the headquarters of the local administrative unit of the Bureau of Indian Affairs, the tribal headquarters, and at various other public areas designated by the election board at least 20 days prior to the election."

7/ In this phrase, the critical word is "headquarters," which is not modified by the word "local." Thus it suggests that the headquarters facility need not itself be local.

tribal members will know when the challenge period begins and ends and so that the period will be the same for everyone. Simultaneous posting is virtually impossible, if posting at an agency is required, when the agency is 60 miles away and closed for business, as it presumably was on Saturday, April 27. The Board concludes that, for purposes of initiating the challenge period, section 81.23(a) is reasonably interpreted as requiring posting in a BIA office only when the office is on or near the reservation where the election takes place. 8/

Appellant also contends that not all absentee ballots could have been counted on April 27 because, according to the voter's pamphlet, ballots mailed on April 26 were to be accepted. In essence, this is an assertion that the posted election results were inaccurate because they did not include all absentee votes. While this might have been a proper challenge to the election results, appellant must first have filed a timely challenge in order to be entitled to pursue it. Her contention concerning absentee ballots does not go to the issue of the timeliness of her challenge.

Appellant next argues that the voter's pamphlet gave inadequate information concerning posting of election results. The pamphlet states at paragraph 9:

CONTESTING ELECTION RESULTS: Any eligible voter may challenge the election results within three (3) days following the announcement of the election results. The challenge must be in writing, must be filed with the Secretary of the Interior, through the Puget Sound Agency Superintendent and must give the grounds for the challenge with substantiating evidence. If, in the opinion of the Secretary, the objections are valid and warrant a recount or new election, the Secretary of the Interior shall so order.

Although the wording of this paragraph is slightly different from the regulatory language and uses the term "announcement" instead of "posting," the Board finds that it is not sufficiently different from the regulation to be misleading. The language was adequate to put appellant on notice that she should be alert to an "announcement" of election results and that she should inquire as to how election results would be announced if she was not familiar with the practice on the Puyallup Reservation.

[3] Appellant's last argument is that non resident voters do not have an equitable chance to challenge election results. This argument appears to be a challenge to the regulatory provisions concerning the time allowed for filing a challenge and the places for posting election results. To be sure, the time for filing a challenge is short, and access to election results is

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4/ According to the affidavit of Ms. Green, a 29-year BIA employee, this interpretation has been routinely followed at the Puget Sound Agency. The circumstances of BIA agencies vary greatly; some serve single tribes and are located on the reservations of the tribes they serve; others, like the Puget Sound Agency, serve several tribes, some of whose reservations are located a considerable distance from the agency.

faster and easier for tribal members living on or near the reservation than it is for non resident members. The Area Director argues that there are valid policy reasons for the regulatory provisions and that, in any event, the Board does not have authority to declare them invalid. The Board agrees that it lacks authority either to disregard the regulatory provisions or to declare them invalid. E.g., Kays v. Acting Muskogee Area Director, 18 IBIA 431 (1990).

For the reasons discussed, the Board concludes that appellant's challenge was untimely. <sup>9/</sup> Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Portland Area Director's June 4, 1991, decision is affirmed.

//original signed

Anita Vogt  
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn  
Chief Administrative Judge

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<sup>9/</sup> In light of this conclusion, the Board does not address the merits of appellant's challenge.